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Supreme Court, U.S.
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No. 02-0253

In The

Supreme Court of the United States

THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO,

Petitioner,

v.

THERESA M. SILER-KHODR,

Respondent,

and

THE UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

All circuit courts that have considered the Equal Pay Act's constitutionality under the Eleventh Amendment, including opinions since 1996, have been unanimous: the statute accords with this Court's Eleventh Amendment jurisprudence. Not only do the circuits agree, but this Court recently indicated a disinclination to review the Equal Pay Act, having denied certiorari on this same question in *Varner v. Illinois State Univ.*, 226 F.3d 927 (7th Cir. 2000), *cert. denied*, 533 U.S. 902 (2001) ("*Varner II*"). The unanimous approach of the circuits, as well as the recent denial of certiorari in *Varner II*, speaks directly to the Petitioner's assertion that there exists a conflict between the extant case law and this Court's Eleventh Amendment holdings. To the contrary, the circuit courts have assiduously taken those holdings into account, including in the *Varner* litigation where this Court had vacated the original panel opinion for reconsideration in light of *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). Put simply, there exists neither a conflict among the circuits, or a conflict between their judgments and the law established by this Court. There is no basis under Rule 10(c) of this Court's rules to grant certiorari.

Moreover, even if this Court were inclined to determine whether the Equal Pay Act is constitutional, this case is not the proper vehicle. Last term, this Court held that states waive Eleventh Amendment immunity when they remove cases to federal court. *Lapides v. Board of Regents of the University System of Georgia*, 122 S.Ct. 1640 (2002). This is a removed case. *See* Petition for Writ of Certiorari, p. 4. To even reach the immunity issue in

this case, the parties would first have to brief – and the Court consider – the tertiary issue whether the Petitioner long ago waived the very immunity it seeks in this case, and has instead attempted to game the system by fully litigating the matter in its chosen federal forum and then raising the immunity issue for the first time only after a judgment was entered against it.

In short, the substantive issue presented by Petitioner is not worthy of further review, and this case is procedurally inappropriate for review. The Petition for Writ of Certiorari should be denied.

FACTS

Initially hired as an Assistant Professor in the Department of Obstetrics and Gynecology in 1976, Theresa Siler-Khodr obtained tenure in 1979 and became a Full Professor with tenure in 1986. *Siler-Khodr v. University of Texas Health Science Center San Antonio*, 261 F.3d 542, 544 (5th Cir. 2001). Siler-Khodr has a Ph.D. in biochemistry, and primarily conducts laboratory research regarding reproductive endocrinology. *Id.* She publishes the results of her research, supervises Fellows and teaches classes. *Id.* Her supervisor is Dr. Robert Schenken ("Schenken"). *Id.* Siler-Khodr has also directed clinical and research service laboratories. *Id.*

Also in the Department is Dr. Sydney Shain ("Shain"). He joined the University in 1989, thirteen years after Siler-Khodr did. *Id.* Like Siler-Khodr, Shain i) has a Ph.D. in biochemistry; ii) primarily conducts laboratory research regarding reproductive endocrinology; ii) publishes the results of his research; iv) supervises departmental

Fellows; v) teaches classes; and vi) is supervised by Dr. Schenken. *Id.*

The Department's Chairman since 1979 is Carl Pauerstein. *Id.* According to Pauerstein, Siler-Khodr and Shain have essentially the same duties and responsibilities. *Id.* Their supervisor, Schenken, agrees.

Although Siler-Khodr and Shain have virtually identical qualifications and jobs, the University compensates them very differently. The University pays Shain approximately $20,000 per year more than Siler-Khodr for performing essentially the same job. *Id.*

One explanation for this discrepancy might be found in the University's wage structure for faculty, one that the University for years has known reveals a bias against its female professors. *Id.* at 544-45. In 1994, the University's president circulated to all faculty a study demonstrating that, within the institution, female faculty's average salary was significantly lower than male professors. At trial, Siler-Khodr also presented the report and testimony of Dr. Mary Gray ("Gray"), a professor in the Mathematics and Statistics Department at American University. *Id.* at 544-45. For this case, Gray performed a multiple-regression analysis of the University's salary wage structure. *Id.* at 544-47. In her analysis, Gray controlled for numerous variables that might affect salary and still found that sex was a statistically significant factor influencing the salaries at the University.[1] *Id.* at 544-47.

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[1] The University had access to the same data yet offered no comparable or contrasting study at trial. *Id.* at 547. Young testified that

(Continued on following page)

As for the difference between Shain's pay and Siler-Khodr's pay, the University initially contended that it reflected nothing more than a difference in the amount and type of grant funding they generated. Siler-Khodr did not, contrary to the University's claim, receive "regular" raises; rather she received substandard ones. *Id.* at 548. At trial, Siler-Khodr demonstrated that she had brought in more grant money than Shain. *Id.* Even more puzzling was the fact that during a four year period in which Shain had no grant money, but Siler-Khodr did, Shain still received greater raises than Siler-Khodr. *Id.*

The University also claimed that the difference was reflective of Shain's pre-UT salary, but this contention failed too. In fact, the University's assertion that it was "undisputed" that Shain would not have accepted employment there for less than $80,000.00 is rather extraordinary. The University provided no evidence that Shain would have never accepted employment for less than $80,000.00, and Respondent has hotly disputed this issue. *Id.* at 549. There was no negotiated salary.[2] *Siler-Khodr,* 261 F.3d at 549. Shain made clear that he wanted out of his old job because he grew tired of the administrative responsibilities he had in that position; instead, he wanted

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nothing has prevented the University from doing so, whether in response to the University's 1994 study or the one that Gray prepared in connection with this litigation. Tr. 416-17.

[2] The University simply decided that Shain's wages would be a raise from his private sector employment, Tr. 290, without ever having any discussions with him about salary requirements. Tr. 290, 331. Further, the University's largess is particularly striking since Shain wanted to leave his prior employer, and says he wanted an opportunity in academia with opportunity for collaboration with colleagues. Tr. 327-28.

to return to academic research. *Id.* He was not leaving the prior employer because of money concerns, and he did not join UT because of the money.[3] On the basis of Shain's testimony alone, the jury could have rejected the University's contention that Shain was offered a certain amount of money in order to entice him to come to the University.

STATEMENT OF THE CASE

Following a four-day trial, the jury found that the University had discriminated against Dr. Siler-Khodr on the basis of gender in violation of Title VII and the Equal Pay Act. *Siler-Khodr*, 261 F.3d at 545. The jury awarded $91,000 for back wages, plus $20,000 for compensatory damages. *Id.* These sums were reflected in the final judgment, along with liquidated damages under the Equal Pay Act in an amount equal to the unpaid back wages. The trial court later awarded attorney's fees, which is the subject of a separate, abated appeal.

The University appealed to the United States Court of Appeals for the Fifth Circuit. For the first time, the University asserted that it was immune from suit pursuant to the Eleventh Amendment. It also challenged the judgment on factual sufficiency grounds. Because of the

[3] Shain's testimony wavered considerably regarding the issue of whether he came to the University for money. He testified at one point that he did not come to the University of Texas for money, and that it was not a factor in why he came to the University. Tr. 330-31. He later testified that the money offered was one consideration, but "not a major consideration by any means."Tr. 330-31. Finally, he also testified that if he had not been offered the amount he was offered, he "probably would have asked for more." Tr. 330-31; *Siler-Khodr,* 261 F.3d at 549.

constitutional challenge to an act of congress, the United States of America intervened.

The Fifth Circuit affirmed the judgment in all respects. All three judges agreed as to factual sufficiency, but Judge DeMoss dissented from the Court's holding that the Equal Pay Act was constitutional. The University sought rehearing *en banc*. The Fifth Circuit denied that petition. Judge Jerry E. Smith authored a dissent, which Judge DeMoss joined.

The University now seeks certiorari.

SUMMARY OF THE ARGUMENT

This case does not meet the requirements for review under Supreme Court Rule 10(c). The extant case law is consistent with this Court's Eleventh Amendment precedent. Further, this is not the proper vehicle to review the Equal Pay Act's constitutionality because that issue may be reached only after considering the side issue of whether the Petitioner waived its potential immunity by removing this case to federal court and then litigating it fully to an adverse judgment.

Separately, in three unamplified paragraphs, the Petitioner seeks review of the judgment's factual sufficiency. This argument does not meet Rule 10(c)'s standard. The record amply supports the judgment. In a case like this, where the jury simply did not believe the Petitioner's affirmative defenses, it has no basis at all to seek Supreme Court review. Moreover, there was ample evidence of pretext to support the Title VII verdict.

ARGUMENT

A. The University has waived its Eleventh Amendment immunity by Removal to Federal Court.

The Court cannot reach the constitutional question without first deciding whether the University has waived its claim of Eleventh Amendment immunity. Siler-Khodr contends that it has. This procedural wrinkle makes the case inappropriate for review.

In *Lapides v. Board of Regents of the University System of Georgia*, 122 S.Ct. 1640 (2002), this Court held that a state's removal of a state law claim to federal court waived such immunity. While this case involves federal claims, the Court specifically reserved the question of waiver by removal of federal claims. *Id.* at 1643.

In this case, the Petitioner not only removed the case to federal court but it proceeded to litigate there from 1997 until 2000. Then, after fully litigating the case on the merits, and losing, it for the first time challenged subject matter jurisdiction on appeal. The Petitioner's decision was strategic; for if it could have obtained dismissal or summary judgment or a favorable jury verdict on the merits in its preferred federal forum, it would never have invoked a jurisdictional objection. The Petitioner was satisfied with federal court only up until the federal court entered a judgment against it. Then, it claimed it had never been subject to the jurisdiction it had invoked.

Contrary to the University's suggestion, the Fifth Circuit's holding that a party could waive such an argument even prior to the *Lapides* case is not binding on this court and may be distinguishable. Nor has this Court squarely addressed the issue. Not only is it arguable that

it would be difficult to foresee the *Lapides* decision, it would be particularly difficult to foresee the application of *Lapides* to federal claims before the *Lapides* decision was published.

Because the constitutional question cannot be reached without first addressing the procedural question, this case is simply not suitable for review.

B. There is no controversy regarding the States' immunity from the Equal Pay Act; Every court to decide this issue has upheld the Equal Pay Act's application to the States.

1. Certiorari Should Be Denied With Respect to the Equal Pay Act's Constitutionality.

This case does not present an important question of federal law that requires resolution of this Court, and neither is the Fifth Circuit's judgment inconsistent with this Court's precedent. The circuit courts to have considered the issue are unanimous for a reason: the Equal Pay Act's constitutionality simply is not an extraordinary proposition. Nor, for that matter, does the issue currently pending before the Court in *Hibbs v. Nevada Dept. of Human Resources*, 273 F.3d 844 (9th Cir. 2001), *cert. granted*, 122 S.Ct. 2618 (2002), shed any light on the issue in this case. There is no conflict between the Equal Pay Act jurisprudence and those cases involving the Family and Medical Leave Act. The Petition for Writ of Certiorari should be denied.

That the EPA is constitutional is so well-established by the circuit courts that each of them to have considered the issue has declared it constitutional. *Siler-Khodr v. University of Texas Health Science Center at San Antonio*,

261 F.3d 542 (5th Cir. 2001); *Cherry v. University of Wisconsin System Board of Regents*, 265 F.3d 541(7th Cir. 2001); *Varner II*, 226 F.3d at 927; *Kovacevich v. Kent State Univ.*, 224 F.3d 806 (6th Cir. 2000); *Hundertmark v. State of Florida Dept. of Transp.*, 205 F.3d 1272 (11th Cir. 2000); *O'Sullivan v. Minnesota*, 191 F.3d 965 (8th Cir. 1999); *Ussery v. State of Louisiana on Behalf of Louisiana Dep't of Health and Hospitals*, 150 F.3d 431 (5th Cir. 1998), *cert. dismissed*, 526 U.S. 1013 (1999); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Varner v. Illinois State Univ.*, 150 F.3d 706 (7th Cir. 1998), *cert. granted, vacated and remanded*, 528 U.S. 1110 (2000) (*Varner I*); *Anderson v. State Univ. of New York*, 169 F.3d 117 (2d Cir. 1999), *cert. granted, vacated and remanded*, 528 U.S. 1111 (2000), *constitutionality confirmed on remand*, 107 F. Supp.2d 158 (N.D.N.Y. 2000).

No circuit has found the statute unconstitutional. Aside from the Fifth Circuit's panel opinion in this case, none of these other opinions even generated a dissent. None of these cases were considered so extraordinary in their holdings, or a departure from this Court's jurisprudence, that they were re-heard *en banc*.

The simplest explanation for this unanimity of opinion is that the circuit courts are correct, and they have correctly considered and synthesized this Court's Eleventh Amendment jurisprudence. The *Varner II* opinion exists only because this Court wished the issue reconsidered in light of *Kimel*. Following the second opinion, this Court elected not to review it. *Varner*, 533 U.S. at 902. The Eleventh Circuit in *Hundertmark v. State of Florida Dept. of Transp.*, 205 F.3d 1272, considered *Kimel* before finding the EPA constitutional. *Hundertmark*, 205 F.3d at 1277. So did *Kovacevich*. 224 F.3d at 820. The Fifth Circuit in this

case considered both *Kimel* and *Board of Trustees of the University of Alabama, et al. v. Garrett*, 531 U.S. 356 (2001). *See Siler-Khodr*, 261 F.3d at 549-550.

The courts are unanimous for good reason. Eleventh Amendment immunity is not absolute. It may be abrogated by Congress pursuant to its enforcement power under § 5 of the Fourteenth Amendment. *Kimel*, 528 U.S. at 81.

Abrogation is governed by a three-prong test discerned from *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *Seminole Tribe*, the Supreme Court held that Congress may constitutionally abrogate a State's Eleventh Amendment immunity if it (a) unequivocally expresses the clear legislative intent to do so, and (b) acts **pursuant to** a valid exercise of constitutional power. *Seminole Tribe*, 517 U.S. at 55. In *City of Boerne*, the Supreme Court reaffirmed a third and rudimentary requirement that the legislation itself be **within** Congressional powers. *See City of Boerne*, 521 U.S. at 535. Put another way, the third query is whether Congressional action was proportional to the injury to be prevented or remedied, in this case, the serious and endemic problem of discrimination against women in the payment of wages. *City of Boerne*, 521 U.S. at 533; *Varner*, 150 F.3d at 716. In passing the EPA, Congress both legally abrogated the States' sovereignty and acted within its Fourteenth Amendment powers. The Circuit Courts that have addressed this issue are unanimous on that point.

2. The *Hibbs* Case is Not Germane to this Case Because the Narrow Scope of the EPA Passes the Congruence and Proportionality Test Even if the FMLA Does Not.

The Equal Pay Act is an extremely narrow statute. By its very terms, it is plainly targeted at gender discrimination. It stands for the narrow proposition of equal pay for equal work. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). The statute targets only gender discrimination and, even then, only discrimination that manifests itself via unequal wages for performing equal jobs. The Equal Pay Act targets only discriminatory and, in the context of government employers, unconstitutional conduct.

The FMLA, by contrast, is an extremely broad statute. It created a federal entitlement and provides a broad class of rights to a broad class of individuals. Its remedies are by no means limited to individuals who have been the object of discriminatory or unconstitutional conduct. Unlike the Equal Pay Act, it is not, by its very text, plainly targeted at gender discrimination. In fact, the FMLA provides protection to men and women who have serious health conditions and does so on the same terms. If the Act was targeted at gender inequality, it is not apparent from the Act itself.

In practice, then, this Court's congruence and proportionality test would seem to have wholly distinct applications as between the two statutes. A finding that the FMLA does not pass muster because it prohibits a wide range of ***constitutional*** conduct has no application to the EPA, which addresses only ***unconstitutional*** conduct. The Eleventh Circuit had it exactly right when it found:

> A state that intentionally discriminates on the basis of gender violates the Fourteenth Amendment unless the gender-based classification serves important governmental objectives and the discriminatory means employed "are substantially related to the achievement of those objectives." *Kimel*, 528 U.S. at 85. . . . This showing requires an "exceedingly persuasive justification" for gender discrimination. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Kovacevich, 224 F.3d at 820. It is likely for that reason, then, that the Fifth, Sixth, Eighth and Eleventh Circuits have found the EPA constitutional but the FMLA unconstitutional in whole or in part.[4] The EPA narrowly targets unconstitutional conduct where the burden is on government to justify itself; the FMLA does not.

The Petitioner urges that there exists an inconsistency between the various circuits' resolution of these two distinct issues, and that this is a reason to grant certiorari. Petitioner's tautology, though, is fundamentally flawed. It is perfectly consistent with this Court's holdings to find that the Equal Pay Act may be constitutionally applied to the states, but that the FMLA may not. The EPA may satisfy the congruence and proportionality test even while other statutes (including other statutes that

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[4] *Compare:* Fifth Circuit: *Siler-Khodr*, 261 F.3d at 550, and *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000); Sixth Circuit: *Kovacevich*, 224 F.3d at 806, and *Sims v. University of Cincinnati*, 219 F.3d 556 (6th Cir. 2000); Eighth Circuit: *O'Sullivan*, 191 F.3d at 967-68, and *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000); and Eleventh Circuit: *Hundertmark*, 205 F.3d at 1274-77, and *Garrett v. University of Alabama Board of Trustees*, 193 F.3d 1214, 1219-20 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001).

purport to target gender bias) do not. Regardless of the FMLA's constitutionality, the fact remains that the Equal Pay Act narrowly targets conduct that is always (or almost always) unconstitutional. That makes the statute constitutional under this Court's test.

C. There is No Factual Sufficiency Issue Worthy of Review.

The University separately contends that this Court should grant certiorari with respect to the judgment's factual sufficiency. The University contends that the jury and trial court were bound, as a matter of law, to believe it when it claimed to have a legitimate, non-discriminatory excuse for paying Siler-Khodr less than Shain. It contends that the jury was obliged to believe that it paid Shain more during the time period covered by Siler-Khodr's suit because, years before, it had hired him at a higher rate. The University claims that this case falls within a narrow exception carved by *Reeves*, where the uncontradicted evidence affirmatively establishes that, notwithstanding the pretextual nature of Defendant's excuse, the adverse action did result from a non-discriminatory basis.

This case, however, does not present a factual sufficiency issue worthy of review. First, none of the judges below thought that the factual sufficiency was remarkable at all. Although the panel opinion drew a dissent as to the constitutional question, all three judges were in agreement as to factual sufficiency. Second, the University's claim about Shain's initial salary was not only hotly contested, it was facially pretextual. As noted above, Shain testified that he did not come to the University of Texas for financial reasons and, indeed, that he sought to leave his prior

job for distinctly non-pecuniary reasons. He wanted to leave private industry, where he was tired of his responsibilities, and return to academia. Those reasons had nothing to do with money, and the fact-finder was certainly free to consider that the market-forces justification was simply an after-the-fact, litigation-borne excuse. Certainly the jury saw no evidence presented that in 1989, at the time of Shain's hiring, anyone at the University ever established that Shain's comparatively large salary was required to secure his employment. Based on the record, one may reasonably infer that he could have been hired at the same wage paid then to Siler-Khodr, who had many years' seniority over him.

Moreover, this case offers a unique benefit in terms of analyzing factual sufficiency. Because Siler-Khodr presented claims under both Title VII and the Equal Pay Act, the jury considered the University's affirmative defense under the EPA. Specifically, the trial court asked the jury to determine whether the University affirmatively proved, as a factual matter, that it had a non-discriminatory basis for paying Siler-Khodr less than Shain. The jury did not believe the University's excuses, and the verdict and judgment reflected that disbelief. Thus, the record in this case affirmatively establishes that the University's excuses were not the true reason for paying Siler-Khodr less than Shain. This case is thus inappropriate in which to consider the issue left open in *Reeves*, which simply cannot arise where the employer bears the burden of disproving discrimination (as it does under the Equal Pay Act), and where it fails to satisfy its burden of proof.

There is no factual sufficiency issue worthy of this Court's review. The University's second point should be rejected.

CONCLUSION

This case does not qualify for review under Rule 10(c). The Circuits to have considered the question have unanimously found the Equal Pay Act constitutional. This Court recently denied review in *Varner II*. There simply is no inconsistency between the Fifth Circuit's holding and this Court's Eleventh Amendment jurisprudence.

Moreover, the constitutional question may not even be reached without also considering whether the University waived its alleged immunity by voluntarily choosing a federal forum. That side issue's presence in this case makes review particularly inappropriate.

Finally, there is no issue worthy of review regarding the judgment's factual sufficiency.

Respectfully submitted,

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